82-1631

No. _____

IN THE

Supreme Court of the United States

October Term, 1982

POTAMKIN CADILLAC CORPORATION,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PHILIP I. BEANE
45 John Street
New York, New York 10038
(212) 227-3015
Counsel for Petitioner

April 6, 1983

(13796)

QUESTIONS PRESENTED

1. Whether a Rule 60 (b) (2) motion should have been granted in a case in which the United States goverment was suing for a penalty based upon failure to file forms with the Federal Trade Commission, when at the time of the motion for summary judgment, the party who prepared Petitioner's form was not available, having left the employ of the Petitioner and subsequently entering a mental institition without leaving any address or other means for Petitioner to communicate with him; and when in less than one year, Petitioner was able to locate this employee and obtain an affidavit, wherein the employee stated that the required filing was made.

2. Should the Court have granted a Rule 60 (b)(2) motion seeking to vacate a judgment entered by way of summary judgment, and not by plenary proceeding,

when an affidavit was submitted which clearly demonstrated a defense, and that in the intrest of justice, a trial on the merits should be had.

3. Should double costs and counsel's fees have been awarded against Petitioner and its attorney, in view of the fact that the case was brough to protect legitimate business interests.

INTERESTED PARTIES

The following may be deemed interested parties to this action:

1. Potamkin Cadillac Corporation

2. United States of America

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

No.

POTAMKIN CADILLAC CORPORATION, Petitioner

v.

UNITED STATES OF AMERICA, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioner Potamkin Cadillac Corporation prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding on January 7, 1983.

OPINION BELOW

The opinion of the Court of Appeals, not yet reported, appears in the Appendix hereto. No opinion was rendered by the District Court for the Southern District of New York.

JURISDICTION

The judgment of the Court of Appeals for the Second Circuit was entered on January 7, 1983, and this petition for certiorari was filed within 90 days of that

date. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

15 United States Code 46, 49, 50

Federal Rules of Civil Procedure 60(b)(2)

28 United States Code 1912 (1976)

28 United States Code 1927 (Supplement V 1981)

STATEMENT OF THE CASE

The Petitioner, Potamkin Cadillac Corporation, a seller of automobiles, is a small business that was selected to provide quarterly financial reports for the third quarter of 1979. The Petitioner was not always required to file these reports, but was sporadically selected from time to time. In fact, at one time Petitioner received a letter from the relevant authorities stating that it was not required to file these reports henceforth unless specially notified.

Potamkin Cadillac Corporation received a special Order of the Federal Trade Commission at its office on February 1, 1980, or thereabouts, requiring it to file a report within ten days. The Petitioner customarily files all government reports that it is required to file, but it does not keep any special records, memoranda, or charts of the fact that a given report may be filed, as this is considered a routine matter. Petitioner was not certain whether the original report demanded in the third quarter in 1979 had been filed, but to the best of the recollection of the Petitioner's employees, without any specific knowledge of the individual report, it was believed that the individual report had been filed. Potamkin Cadillac Corporation is a small business attempting to survive in the economically - troubled automobile industry, and therefore does not make the filing of reports with the Federal Trade Commission its principal

concern. The Federal Trade Commission does not even require these reports of Petitioner on a regular basis, as small businesses, such as Potamkin Cadillac Corporation, are merely required to file such reports on a random, selective basis.

Sometime in September, 1980, the government instituted suit against Potamkin Cadillac Corporation to recover a statutory penalty pursuant to Sections 9 and 10 of the Federal Trade Commission Act (FTC), 15 U.S.C. 49 and 50. The basis of the complaint was that the defendant Potamkin Cadillac Corporation failed to file the financial report required by the Federal Trade Commission.

Potamkin Cadillac Corporation filed an answer which alleged that the required report had been filed; that the defendant was not required to file a report; that defendant had filed the report upon receiving the summons and complaint; and that the demands for reports and the forms

supplied by the government were confusing. Upon the institution of the lawsuit, a second copy of the report was sent to the Federal Trade Commission. After further requests from the United States Attorney, a third copy was sent to the United States Attorney.

On December 18, 1981, the plaintiff United States of America made a motion for summary judgment in this matter, and submitted an affidavit of an evidentiary nature by Ronald H. Lee, Chief Accounting Operations Branch Division of Financial Statistics of the Bureau of Economics, wherein Mr. Lee stated that the records of the Federal Trade Commission did not contain any evidence that Potamkin Cadillac Corporation had filed a report for manufacturing, mining and trade corporations for the fourth quarter of 1979. Potamkin Cadillac Corporation submitted an affidavit by its present controller, who had served in that position

for one year at the time, stating that it is the customary policy of Potamkin Cadillac Corporation to file all government reports requested. With regard to the requirement for the initial filing, one could not ascertain whether or not a particular employee had or had not filed the report. Potamkin Cadillac Corporation did not wish to file a false affidavit with the Court, and so stated to the government at all times. However, with regard to the second filing of the required report; namely, in September, 1980, which filing date would have significantly shortened the penalty period, Potamkin has always taken the position with the government that the report was definitely filed at that time. A bit of confusion with the dates ensued on both sides, and a misunderstanding may have arisen as to which filing date was referred to in the court papers. The Court is respectfully requested to bear in mind that two filing dates are involved here: the

initial date, with regard to which no absolute certainty of the filing or failure to file exists, and the second date, after summons and complaint of the United States had been served in September, 1980, where there was never any question about Petitioner's controller filing the report.

The government in its papers has made a great issue of the fact that Petitioner's counsel sent a letter to the government stating that the Petitioner could not identify the employee who filed the report. However, the government forgets that the same letter also stated that the report was filed three years ago and is dated 1981, and therefore obviously refers to the initial filing, and not to the second filing after the summons and complaint. In fact, the answer filed with the Court clearly indicated that the report had been filed at the time the summons and complaint were served, unquestionably.

The Petitioner, being a relatively

small business, does not have a totally professional filing system, and Petitioner's business is not filing reports and keeping copies of various documents for the Federal Trade Commission. Petitioner attempts to maintain its business, pay its employees, and contribute to the economy of the United States in a meaningful manner by creating jobs and paying taxes to the government. Furthermore, at the time of the motion for summary judgment, the controller who had filed the requested report in September, 1980, was not available. It was learned much later that Potamkin's former controller had been confined to a mental institution, and he had only left his former employer with the telephone number of his residence, which naturally did not answer. There was no way that the present Petitioner could locate its former employee, as he had entered a mental institution in upstate New York and could not be reached. Therefore, no

affidavit from that employee, Marvin Schell, was available to refute the motion for summary judgment.

Potamkin Cadillac Corporation, in fighting the United States's motion for summary judgment, relied heavily on the rule in the Second Circuit that summary judgment would not be granted in a case of this type (Empire Electronics v. United States, 311 Fed.2d 175, 177, 2nd Circuit (1962); Heyman v. Commerce and Industry Co., 524 Fed.2d 1317, 1320, Second Circuit, 1975). Potamkin Cadillac Corporation believed that a sufficient issue had been raised to bar summary judgment in this matter, and that the government's affidavit was not sufficient for the granting of summary judgment, based upon the aforesaid cases. Summary judgment was granted against Potamkin Cadillac Corporation in the amount of $39,000, assessing the penalty for the full period, from April 20, 1980 to May 8, 1981.

Potamkin Cadillac Corporation appealed the granting of summary judgment to the United States Circuit Court of Appeals, Docket No. 82-6053, and the Court of Appeals affirmed the judgment of the trial court. During that period of time, Potamkin Cadillac Corporation was able to locate its former controller, Marvin Schell. Marvin Schell then supplied an affidavit to the Court which stated that he was absolutely certain that the report had been filed in September, 1980. Mr. Schell also stated that to the best of his knowledge, the report was filed when originally requested, but that he absolutely and definitely remembered filing the report in September, 1980 because of the fact that it was a report filed under the pressure of litigation.

Judge Kevin Duffy denied the Rule 60(b)(2) motion by an endorsed memorandum filed on May 19,1982, without any opinion at all. The matter was then appealed to

the United States Court of Appeals for the Second Circuit, and the decision of Judge Duffy was again affirmed, as per the decision included in the Appendix hereto. A motion to combine this appeal awith the prior appeal was denied.

The rule on motions under Section 60(b)(2) is quite wellknown: counsel must act diligently to obtain evidence, and if the evidence was available at the time of trial, a decision cannot be subject to a motion under 60(b)(2). It is to be pointed out that there was never a trial in this matter, but merely a motion for summary judgment. Counsel, on the basis of the record, did all that he could to obtain an affidavit from Petitioner's controller Marvin Schell, and was unable to do so. Counsel, therefore, could only submit a hearsay affidavit of his own, which would be insufficient to defeat the government's motion, as the person with actual knowledge of the facts was Marvin Schell. An

affidavit by counsel to the effect that Marvin Schell had informed him that he had indeed filed the report would not have been sufficient to defeat the motion for summary judgment, and would have been unprofessional.

Because of the fact that Marvin Schell left the employment of Potamkin Cadillac Corporation under difficult circumstances owing to his mental condition, counsel was most hesitant to state to the Court what Marvin Schell had told him, because counsel was not convinced that he could prove it or even obtain an affidavit from Marvin Schell. Marvin Schell did not leave the employ of Potamkin Cadillac Corporation with any sort of notice; he left suddenly one day without any notice and disappeared.

It appears that Marvin Schell was able to obtain a cure for his condition, and Petitioner's counsel was subsequently able to locate Marvin Schell and obtain an

affidavit from him, wherein he stated to the Court that without any doubt he did file the report the second time it was demanded, in September, 1980, and therefore, that the penalty should be terminated as of that date. Marvin Schell believed that he had also filed the report when originally demanded, but could not be absolutely certain of it, and therefore, no such certainty was stated in his affidavit.

Counsel was as diligent as possible under the circumstances and facts of this case, considering the financial resources available to the business involved in this proceeding. The law is quite clear that motions for relief under Section 60(b)(2) are not to be granted lightly; but the law has clearly made an exception in such cases where the motion presents evidence that would clearly show that the moving party has a great probability of success, and the due diligence and other such aspects of the motion should give way to the granting of

justice in the particular matter. It would be a far greater evil to deny the motion on some technical ground and waste the time of the Court and the litigants than to deny justice to a party who has not received it and who has made a preliminary showing that an injustice occurred (Krock v. Electric Motor & Repair Co., 339 Fed.2d 73,74, 1st Circuit, 1964; cert. denied, 377 U.S. 934, 84 Sup. Ct. 1338, 12 L. Ed.2d 298). And, to the same effect, United States of America v. Walus, 1616 Fed.2d 283, U.S.C.A. 7th Circuit, Feb. 13, 1980. Considering the fact that a motion for summary judgment is a drastic weapon, and does not allow the Court to benefit from the effects of cross-examination of the accusing party, it is obvious that in a case of this type, considering the minimal amount of work that would have been involved, it was a gross abuse of discretion not to grant the Section 60(b)(2) motion, and allow Potamkin Cadillac Corporation to have its day in

Court. There was also good authority to the effect that if information is not revealed to the Court because of a mental disorder, this is a factor to be used in determining a motion pursuant to Section 60(b)(2) and granting relief, and not denying the motion because of an alleged lack of diligence (Nagell v. United States, 354 Fed.2d 441, C.A. 5th, 1966).

The imposition of double costs and attorney's fees awarded by the Court Below was improper, as there certainly has not been any deliberate delay on the part of Petitioner or its counsel, nor has Petitioner engaged in frivolous and vexatious appeals. Small businesses do not have large, million-dollar law firms to defend them, and perhaps they do not work as efficiently as large businesses, but such corporations are certainly entitled to present their case, even if the case is not presented in the fashion that a Circuit Court of Appeals might expect from a large

law firm. If there is a demand for substantial justice, this demand should not be curtailed by the imposition of damages and double costs. This is a dangerous precedent. What is considered vexatious or frivolous today may be the startling truth of tomorrow. The right of the public and of business to litigate and to present facts to courts should not be cast under the cold chill of imposition of damages and double costs, except in the most clear and obvious of circumstances. A decision of this type violates the First, Fifth, Sixth and Seventh Amendments of the Constitution of the United States, and the right to petition for redress of grievances. In this particular instance, Petitioner is being asked to pay $40,000 for the alleged failure to file a report Petitioner believes was filed. Petitioner is certainly entitled to have its day in court, and has paid the government well for its day in court (State of Virginia v. Chas. Pfizer &

Co., 440 Fed.2d 1079, 1971). There is nothing in the record that will show bad faith on the part of the appellants; there may have been some confusion, as there naturally would be in this type of case.

The decision in this case is important to millions of small businesses in America. Unless relief is granted here, the government will obviously hold the power to destroy every small business in America by requiring them to maintain standards of proof of filing of reports that are untenable. Business is complicated enough without having to be involved in unnecessary record-keeping. The government should have the primary burden of proving that records have not been filed, and this should be done in a plenary proceeding where cross-examination of the government administrators is possible so that one can ascertain what standards the government uses and what safeguards it has in maintaining and

classifying these records. It is not at all unusual for government papers to get lost or be misplaced, and a small business should have the right to come into court and defend itself against this type of charge without being subject to summary judgment and without being required to prove that it filed a report when there is no such standard of proof enunciated within the legislation requiring the reports.

In view of the circumstances of this case, and the unusual requests of the government in obtaining this information from small businesses, it is requested that the judgment of the lower court be set aside. The Petitioner only asks that it be given its day in court so that the credibility of its witness can be judged by either a judge or a jury in person, rather than from hard, cold print on a typewritten page.

REASONS FOR GRANTING THE WRIT

1. THE DENIAL OF THE SECTION 60(b)(2) MOTION BY THE COURT BELOW WAS IMPROPER.

2. THE IMPOSITION OF DOUBLE COSTS AND ATTORNEY'S FEES WAS NOT PROPER.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Second Circuit.

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APPENDIX

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 109—August Term, 1982

(Argued September 1, 1982 Decided September 22, 1982)

Docket No. 82-6053

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

—v.—

POTAMKIN CADILLAC CORPORATION,

Defendant-Appellant.

Before:

LUMBARD, CARDAMONE and WINTER,

Circuit Judges.

Appeal from a grant of summary judgment by the United States District Court for the Southern District of New York, Kevin Thomas Duffy, *Judge,* finding defendant liable for failure to file a report as required by

special order of the Federal Trade Commission, 15 U.S.C. § 46(b) (1976).

Affirmed.

PHILIP I. BEANE, New York, New York, *for Appellant.*

JONATHAN A. LINDSEY, Assistant United States Attorney, Southern District of New York (John S. Martin, Jr., United States Attorney, Southern District of New York, Richard N. Papper, Assistant United States Attorney, of counsel), *for Appellee.*

Per Curiam:

Defendant-appellant Potamkin Cadillac Corporation ("Potamkin") appeals from a grant of summary judgment entered February 19, 1982 in the United States District Court for the Southern District of New York (Duffy, *Judge*) which found Potamkin liable for failing to file a financial report pursuant to an order of the Federal Trade Commission ("FTC") in violation of 15 U.S.C. § 46(b) (1976) (Section 6 of the Federal Trade Commission Act) and assessed penalties of $100 for each day the report was not filed, 15 U.S.C. § 50 (1976) (Section 10 of the Federal Trade Commission Act), for a total of $39,100. Potamkin requests reversal of Judge Duffy's order and a remand to the District Court for a full evidentiary hearing, asserting that unresolved issues of

fact remain. We find this contention utterly without legal merit. Indeed, we find this appeal frivolous within the meaning of Rule 38, Fed. R. App. P. and we assess jointly and severally against Potamkin and its lawyer, Philip I. Beane, Esquire, double costs and $500 in attorney's fees in favor of the Government.

The undisputed facts in this case show that Potamkin is a corporation engaged in interstate commerce; that on February 1, 1980 the FTC issued a special order directing Potamkin to file within 10 days of receipt an informational report covering the last quarter of 1979 on an FTC form attached to the order; that on February 11, 1980 the order was served on Potamkin by registered mail and service was acknowledged; that Potamkin did not move to quash or limit the order or to obtain an extension of time for filing; that the FTC issued a notice of default to Potamkin stating that the statutory penalty of $100 per day would start to run on April 12, 1980; that service of the default notice was acknowledged on March 11, 1980; that this action was brought on September 3, 1980; and that by letter of May 8, 1981 Potamkin sent a partial report to government counsel which was deemed an acceptable filing. The report thus was not filed for 391 days after the statutory penalty began running; of that period, approximately 248 days elapsed after the government's complaint in this case was filed.

Throughout these proceedings, Potamkin has claimed that a timely filing was in fact made and the document was lost by the government; alternatively, that Potamkin was not required to file the report in the first place; that it had filed the report upon receipt of the complaint; or that "all of the documents used in this matter by the government are not clear and concise, and are not readily understandable or decipherable." Potamkin's evidence

that the report was filed is an affidavit sworn by its attorney, Philip I. Beane, who concededly lacks personal knowledge, that "[t]o the best of POTAMKIN's knowledge, the report was filed in a timely fashion." The supporting proof is best summed up by a letter from Beane to a government attorney which states, "I do not have the specifics of the filing, nor can I tell you which employee filed it. . . . I have no cover sheet nor any other items. . . . There is nothing else that I can give you on this matter." On the government's motion for summary judgment, Judge Duffy properly ruled that Potamkin's unsupported assertion that it had filed the report did not create a genuine issue of material fact which might preclude summary judgment.

Rule 56(e) of the Federal Rules of Civil Procedure states unequivocally that in order to defeat a motion for summary judgment, the opposing party must "set forth specific facts showing that there is a genuine issue for trial." Such an issue is not created by a mere allegation in the pleadings, *Applegate v. Top Associates, Inc.*, 425 F.2d 92, 96 (2d Cir. 1970); *Korinis v. Sealand Services, Inc.*, 490 F.Supp. 418, 422 (S.D.N.Y. 1980), nor by surmise or conjecture on the part of the litigants, *Nemo v. Allen*, 466 F.Supp. 192, 195 (S.D.N.Y. 1979). As this Court has more recently stated in *Quinn v. Syracuse Model Neighborhood Corp.*, 613 F.2d 438, 445 (2d Cir. 1980):

> [T]he mere possibility that a factual dispute *may* exist, without more, is not sufficient to overcome a convincing presentation by the moving party. *See Gatling v. Atlantic Richfield Co.*, 577 F.2d 185, 187-188 (2d Cir. 1978), *cert. denied*, 439 U.S. 868, 99 S.Ct. 181, 58 L.Ed.2d 169 (1979). The litigant opposing summary judgment, therefore, 'may not rest

> upon mere conclusory allegations or denials' as a vehicle for obtaining a trial. *SEC v. Research Automation Corp.*, 585 F.2d 31, 33 (2d Cir. 1978). Rather, he must bring to the district court's attention some affirmative indication that his version of relevant events is not fanciful.

That Mr. Beane's unsupported assertions do not meet this standard must be as obvious to him as it is to us.

Potamkin's other legal defenses merit only the briefest of comments. FTC authority to require Potamkin to file the report is clearly laid under 15 U.S.C. § 46(b), which provides the Commission with the power to

> require, by general or special orders, persons, partnerships, and corporations, engaged in or whose business affects commerce, . . . to file with the Commission in such form as the Commission may prescribe annual or special, or both annual and special, reports or answers in writing to specific questions, furnishing to the Commission such information as it may require as to the organization, business, conduct, practices, management, and relation to other corporations, partnerships, and individuals of the respective persons, partnerships, and corporations filing such reports or answers in writing. Such reports and answers shall be made under oath, or otherwise, as the Commission may prescribe, and shall be filed with the Commission within such reasonable period as the Commission may prescribe, unless additional time be granted in any case by the Commission.

Since Potamkin made no effort to clarify matters with the FTC, even after the warning letter, we agree with Judge

Duffy that Potamkin's claim that government information requests were confusing is "almost an insult to our entire legal system." Memorandum and Order dated February 19, 1982 at 3.

Potamkin's appeal amounts to "little more than a continued abuse of process" which raises no "colorable legal or factual basis for the relief sought." *Muigai v. INS*, No. 82-4034, slip op. at 3260 (2d Cir. June 14, 1982). It is totally lacking in merit, framed with no relevant supporting law, conclusory in nature, and utterly unsupported by the evidence. It was, we believe, "brought without the slightest chance of success," *Bankers Trust Co. v. Publicker Industries, Inc.*, 641 F.2d 1361, 1367-68 (2d Cir. 1981), an imposition on the government which is forced to defend against the appeal and on the taxpayers who must pay for that defense. Accordingly we assess double costs and $500 in attorney's fees against Potamkin and its lawyer, Philip I. Beane, jointly and severally, since attorney and client are in the best position between them to determine who caused this appeal to be taken. *See* Fed. R. App. P. 38.

The judgment below is affirmed.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 463—August Term, 1982

(Argued January 5, 1983 Decided January 7, 1983)

Docket No. 82-6155

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

—v.—

POTAMKIN CADILLAC CORPORATION,

Defendant-Appellant.

Before:

KEARSE, WINTER, and PRATT,

Circuit Judges.

Appeal from an order of the United States District Court for the Southern District of New York, Kevin Thomas Duffy, *Judge*, denying motion pursuant to Fed. R. Civ. P. 60(b)(2) to vacate judgment on grounds of newly discovered evidence.

Affirmed, with double costs and attorneys' fees assessed against appellant's attorney, Philip I. Beane.

PHILIP I. BEANE, New York, New York, *for Defendant-Appellant.*

JONATHAN A. LINDSEY, Assistant United States Attorney, New York, New York (John S. Martin, Jr., United States Attorney for the Southern District of New York, Thomas D. Warren, Assistant United States Attorney, New York, New York, on the brief), *for Plaintiff-Appellee.*

KEARSE, *Circuit Judge*:

Defendant Potamkin Cadillac Corporation ("Potamkin") appeals from an order of the United States District Court for the Southern District of New York, Kevin Thomas Duffy, *Judge*, denying Potamkin's motion pursuant to Fed. R. Civ. P. 60(b)(2) to vacate the court's judgment of February 24, 1982, against Potamkin on grounds of newly discovered evidence. Finding no merit whatever in the appeal, we affirm, and, pursuant to 28 U.S.C. § 1912 (1976) and 28 U.S.C. § 1927 (Supp. V 1981), we award double costs and attorneys' fees to appellee United States, to be paid by Potamkin's attorney, Philip I. Beane, personally.

A. *Background*

The present action was brought on September 3, 1980, by the United States to compel Potamkin to file a report with the Federal Trade Commission ("Commission") as required by a special order of the Commission pursuant to § 6(b) of the Federal Trade Commission Act, 15 U.S.C. § 46(b) (1976), and to assess against Potamkin a statutory penalty, pursuant to 15 U.S.C. § 50 (1976), of $100 for each day of its failure to file the required report after April 12, 1980.[1] On May 8, 1981, Potamkin sent a partial report to government counsel which was treated as an acceptable filing. Thereafter the government moved for summary judgment seeking, *inter alia*, to recover the $100 penalty for each of the 391 days from April 12, 1980 to May 8, 1981. The government's motion was granted, and final judgment in the government's favor for $39,100 was entered on February 24, 1982. As discussed in Part C below, the judgment was affirmed on appeal. *United States v. Potamkin Cadillac Corp.*, No. 82-6053 (2d Cir. Sept. 22, 1982) ("*Potamkin I*").

While the direct appeal was pending, Potamkin moved in the district court for an order pursuant to Rule 60(b)(2) vacating the judgment on the ground of "newly discovered" evidence. Potamkin submitted an affidavit asserting that in fact Potamkin had filed the required report with the Commission in September 1980, and that no penalty should have been levied against it for failure to file after that time.[2] The affidavit of Marvin Schell,

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1 The government had sent Potamkin a notice of default which was received by Potamkin on March 11, 1980.

2 The motion also sought, with no evidentiary basis, the opportunity to reargue Potamkin's contention that it had filed the required report in April 1980.

Potamkin's controller until the end of 1980, stated that within two weeks after September 9, 1980, the date on which Potamkin was served in the present action, Schell had sent the Commission, by certified mail, with return receipt requested, a report in compliance with the Commission's order. Potamkin also proffered two affirmations by Beane, its attorney. The first Beane affirmation, dated April 26, 1982 ("First Beane Aff."), stated that it was only recently that Beane had been able to locate Schell. It, also stated, as if to bolster Schell's statements, that in the fall of 1980 Schell had informed Beane that a report had been filed in September 1980 and had provided Beane with a copy:

> I can state as my own knowledge that I was informed by MR. SCHELL at the time that this proceeding was served upon the defendant that the report would be filed shortly thereafter, and that it was filed shortly thereafter, and that the copy of the report that I had supplied to the U.S. Attorney was a copy given to me by MR. SCHELL within two (2) weeks of that date, ...

(First Beane Aff. ¶ 15.) The second Beane affirmation, dated May 20, 1981 [*sic*][3] ("Second Beane Aff."), reiterated that Beane had been informed in September 1980 that Schell had filed a report in September 1980: "The [September 1980] report, I was told, was filed by MR. SCHELL with the Federal Trade Commission, and I did know this all along." (Second Beane Aff. ¶ 5.)

The government stated that the FTC had no record of ever having received the alleged September 1980 report.

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[3] The contents of this affirmation make clear that it was a 1982 document.

Potamkin produced neither a return receipt nor a copy of the report.

The district court denied Potamkin's motion to vacate the judgment.

B. *The Merits of the Rule 60(b) Motion*

The merits of the present appeal need little discussion. The standard for appellate review of denial of a Rule 60(b) motion, nowhere recognized in Potamkin's brief on appeal, is whether or not the district court abused its discretion. *E.g., Audiovisual Publishers, Inc. v. Cenco, Inc.*, 580 F.2d 50, 52 (2d Cir. 1978). We find no such abuse.

In order to succeed on a motion pursuant to Rule 60(b)(2), the movant must present evidence that is "truly newly discovered or . . . could not have been found by due diligence." *Westerly Electronics Corp. v. Walter Kidde & Co.*, 367 F.2d 269, 270 (2d Cir. 1966). The evidence offered by Potamkin as to the alleged September 1980 filing fails to meet either test. The first Beane affirmation stated that Schell had informed Beane contemporaneously of the September 1980 filing. The second Beane affirmation confirmed that Beane had known "all along" of this filing. Schell was employed by Potamkin for several months after September 1980 and since he supposedly had provided Beane with both information as to the filing and a copy of the report, it would be the height of whimsy to characterize Schell's present statements as "truly newly discovered" evidence.

Further, Schell's affidavit is silent as to why his statement was not available earlier, and Beane's affirmations offer only faint, and hardly credible, enlightenment. No explanation whatever was offered as to why Schell's evidence was not memorialized prior to his departure

from Potamkin. And Beane's only explanation as to why he was not able to reach Schell between the end of 1980 and April 1982 was, "[t]he telephone number that I had was a wrong number, which was never answered." (First Beane Aff. ¶ 6.) Beane stated that he could not locate Schell "by any other means," (*id.*), but did not specify what other means, if any, were attempted.

Given the feebleness of Beane's proffer of "due diligence," and Beane's acknowledgement that he had known of the alleged September 1980 filing all along, it was well within the district court's discretion to reject the explanations and to consider the "evidence" not newly discovered.

C. *Costs of this Appeal*

We regard Potamkin's appeal from the denial of its Rule 60(b) motion as entirely frivolous—a quality plainly shared by the motion itself—and we are constrained to note that it follows close on the heels of Potamkin's direct appeal from the final judgment, which we also found to be "utterly without legal merit," and "frivolous within the meaning of Rule 38, Fed. R. App. P." *Potamkin I*, slip op. at 15. Having found in *Potamkin I* that Potamkin's assertions in opposition to the government's summary judgment motion were so lacking in substance and substantiation that it must have been obvious to Beane that they were inadequate to defeat summary judgment, *id.* at 16-17, we concluded as follows:

> Potamkin's appeal amounts to "little more than a continued abuse of process" which raises no "colorable legal or factual basis for the relief sought." *Muigai v. INS*, No. 82-4034, slip op. at 3260 (2d Cir. June 14, 1982). It is totally lacking in merit, framed

> with no relevant supporting law, conclusory in nature, and utterly unsupported by the evidence. It was, we believe, "brought without the slightest chance of success," *Bankers Trust Co. v. Publicker Industries, Inc.*, 641 F.2d 1361, 1367-68 (2d Cir. 1981), an imposition on the government which is forced to defend against the appeal and on the taxpayers who must pay for that defense.

Id. at 18. Accordingly, in *Potamkin I*, we assessed double costs plus $500 in attorneys' fees. The assessment was made against Potamkin and Beane jointly and severally, in the belief that Potamkin and Beane were in the best position to determine which of them should bear responsibility for the frivolous appeal.

The quality of the two appeals and the inconstancy of the representations and arguments made by Beane in Potamkin's behalf at the trial and appellate levels now convince us that the conclusion of the litigation has been unduly delayed, and the proceedings unreasonably multiplied, and that Beane must bear the responsibility. For example, in October 1981, Beane refused to disclose his knowledge of the Schell evidence of a September 1980 filing. At that time he represented to the government that Potamkin had filed only one report with the Commission, that that had been done more than three years earlier, and that Beane had no information as to the filing or which Potamkin employee had filed it. Beane's 1982 affirmations and his statements at oral argument on this appeal, however, disclose that he was aware in October 1981, and earlier, of the alleged September 1980 filing. Similarly, although Beane claims to have known all along that Schell filed the September 1980 report, Beane did not mention this either to the district court in opposition to

the government's summary judgment motion or to this Court on appeal in *Potamkin I*. His statements at oral argument of the present appeal suggested that he had made tactical decisions not to argue the alleged September 1980 filing in these earlier proceedings. Further, whereas Beane's proffer to the district court of his "due diligence" in trying to locate Schell consisted solely of a statement that he had been trying the wrong telephone number, Beane stated to us on oral argument that the reason he had been unable to locate Schell until April 1982 was that Schell had been in a mental institution.

Under 28 U.S.C. § 1912, the Court has discretion to award to the prevailing party double costs and damages for delay caused by the appeal. In addition, under 28 U.S.C. § 1927

> [a]ny attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.

See Bankers Trust Co. v. Publicker Industries, 641 F.2d 1361, 1367-68 (2d Cir. 1981) (appellant and its counsel assessed double costs and up to $10,000 for appellee's other expenses, including counsel fees, for bringing frivolous and dilatory appeal); *Hastings v. Maine-Endwell Central School District*, 676 F.2d 893 (2d Cir. 1982) (district court instructed to consider whether all or part of costs and attorneys' fees, caused by blatantly baseless appeal, should be assessed against appellant's attorney personally).

The baseless and inconstant character of the arguments advanced throughout this litigation on behalf of Potamkin through the letters, affirmations, and oral representations of Beane compel us to conclude that Beane has unduly delayed the termination of this litigation and has caused the proceedings to be unreasonably and vexatiously multiplied. Accordingly, on this appeal, we assess double costs plus $500 in attorneys' fees, to be paid by Philip I. Beane, personally.

The order of the district court is affirmed.

No. 82-1631

IN THE

Supreme Court of the United States

October Term, 1982

POTAMKIN CADILLAC CORPORATION,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUPPLEMENTAL APPENDIX

PHILIP I. BEANE
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June 9, 1983

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Admitted in Calif.

Philip I. Beane
Counselor at Law
45 John Street
New York, N.Y. 10038
(212) 227-3015

Supreme Court of the United States
Office of the Clerk
Washington, D.C. 20543

Re: Potamkin Cadillac Corporation,
v. United States
No. 82-1631

Dear Ms. Ruffin:

This letter will act as a certification that Potamkin Cadillac Corporation is an independent entity, without any affiliates or associates companies.

Very truly yours,

PHILIP I. BEANE

PIB:ag

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------X

UNITED STATES OF AMERICA,

Plaintiff,

-against-

POTAMKIN CADILLAC CORP.,

Defendant.

----------X

NOTICE OF MOTION
TO MODIFY OR VACATE JUDGMENT

PHILIP I. BEANE
Attorney for Defendant Potamkin Cadillac Corp.
45 John Street
New York, New York 10038
(212) 227-3015

Motion Denied – So Ordered

/S/
KEVIN THOMAS DUFFY
U.S.D.J.

U.S. DISTRICT COURT
Filed Feb. 19, 1982
S.D. of N.Y.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------X

UNITED STATES OF AMERICA,

Plaintiff,

-against-

POTAMKIN CADILLAC CORPORATION,

Defendant.

80 Civ. 5028
(KTD)
MEMORANDUM
& ORDER

----------X

APPEARANCES:

HON. JOHN S. MARTIN, JR.
United States Attorney for the
Southern District of New York
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New York, New York 10007
Of Counsel: Jonathan A. Lindsey, Esq.
Assistant U.S. Attorney

PHILIP I. BEANE, ESQ.
Attorney for Defendant
45 John Street
New York, New York 10038

KEVIN THOMAS DUFFY, D.J.:

The government moves for summary judgment in this case seeking the imposition of a $39,100 statutory forfeiture for failure to file a financial information form required by the Federal Trade Commission ("F.T.C.") pursuant to 15 U.S.C. §§ 49 and 50.

The undisputed facts show that the defendant is engaged in interstate commerce; that the F.T.C. on February 1, 1980 issued a special order directing the defendant to file a special report, on a F.T.C. form attached to the order, covering the last quarter of 1979; that the order was served on defendant on February 11, 1980; that defendant did not move to quash or limit the order or to obtain an extension of time to do so; that the F.T.C. issued its notice of default to the defendant for failure to file the report; that the defendant actually received the notice of default on March 11, 1980; and that by letter of May 8, 1981, the defendant transmitted a partial report to government counsel which the government deems a filing of the required report. The report was not filed for 391 days after the per day forfeiture began running.

The defendant has alleged in its answer to the complaint that a timely filing had been made but in the letter on May 8, 1981, enclosing the partial report, defense counsel stated "I do not have the specifics of the filing, nor can I tell you which employee filed it . . . I have no cover sheet nor any other items. There is nothing else I can give you on this matter." It is interesting to note that this partial filing took place only after the first pre-trial conference in this matter. In any event, no genuine issue of fact is created by such an unsubstantiated surmise or conjecture by the non-movant. *See Nemo v. Allen*, 466 F. Supp. 192, 195 (S.D.N.Y. 1980). In its reply papers to this motion it is alleged "As far as Potamkin could tell, the report was timely filed." That is not enough to raise a real question of fact. Furthermore, nowhere does the defendant allege when the report finally submitted was executed or where it came from. *Cf.* 18 U.S.C. § 1001.

The other defenses raised by the defendant are also unavailing. Contrary to the defendant's assertion, it was required to file the report. The fact that the defendant filed a report after this action was begun does not excuse its failure to do so when it was required – the filing merely cuts off the accumulation of the statutory forfeiture. The last asserted defense is almost an insult to our entire legal system – i.e., demands for reports and forms supplied by the government are confusing. If the defendant was confused by the F.T.C. orders and forms and by the necessity of filing the reports then it could have asked for assistance in comprehending the report requirements or an extension of time in which that understanding could be gained. The sophistry of this argument is shown by the following excerpt from the defendant's submission:

> The reports deal with trade and mining companies. POTAMKIN is certainly not mining company [sic]; the Court may take judicial notice of the fact that the defendant sells automobiles. Likewise, to call it a trade company is hard to conceive, as it is not a trading company; but a company that engages in the selling of automobiles, not in the barter of goods.
>
> (Affidavit of Philip I. Beane, ¶ 3).

The government's motion is granted. Judgment will enter forthwith.

SO ORDERED.

DATED: New York, New York
February 19, 1982

/S/
KEVIN THOMAS DUFFY
U.S.D.J.

No. 82-1631

In the Supreme Court of the United States

OCTOBER TERM, 1982

POTAMKIN CADILLAC CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

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In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-1631

POTAMKIN CADILLAC CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the district court erred in denying a Rule 60(b), Fed. R. Civ. P., motion for a new trial.

1. On February 1, 1980, the Federal Trade Commission issued a special order directing petitioner to file an informational report covering the last quarter of 1979 within 10 days of receipt of the order (Pet. App. A3). Petitioner acknowledged receipt of the order by registered mail on February 11, 1980. It did not respond within the required 10 days, nor did it move to quash or limit the order, or to obtain an extension of time for responding (*ibid.*). On March 11, 1980, the FTC served a default notice on petitioner, stating that a statutory penalty for failure to file would begin to run on April 12, 1980. When no report was forthcoming, the United States, on behalf of the FTC, brought an action on September 3, 1980, in the United States District Court for the Southern District of New York

seeking compliance with its order and statutory penalties (Pet. App. A-3). Ultimately, by letter of May 8, 1981, petitioner's counsel submitted a partial report to government counsel, consisting of a single undated sheet without identifying notations, and this letter was deemed an acceptable filing. The report thus was filed 391 days after the statutory penalty period began and 248 days after the government filed its complaint in the case (*ibid.*).

In January 1982, the government filed a motion for summary judgment in the district court litigation, seeking statutory penalties for late filing. In response to the government's motion, petitioner's attorney, Philip Beane, filed an affidavit that made the unsupported assertion that "[t]o the best of [petitioner's] knowledge, the report was filed in a timely fashion." Neither this affidavit nor any other document before the court averred any personal knowledge of filing (Pet. App. A4). The district court granted the government's summary judgment motion (Jt. App. A59-A62).[1] The court concluded that "no genuine issue of fact is created by such an unsubstantiated surmise or conjecture by" petitioner and that petitioner had failed to allege "when the report finally submitted was executed or where it came from" (*id.* at A61).

The court of appeals affirmed (Pet. App. A1-A6), agreeing that attorney Beane's unsupported assertions did not defeat a summary judgment motion, which "must be as obvious to him as it is to us" (*id.* at A5).[2] The court of appeals also assessed double costs and $500 attorneys fees against petitioner and attorney Beane jointly on the ground

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[1]"Jt. App." refers to the appendix in the court of appeals in No. 82-6155.

[2]The court also upheld the FTC's authority to require the report under 15 U.S.C. (Supp. V) 46(b), and it rejected petitioner's belated contention that the FTC order was confusing (Pet. App. A5-A6).

that the appeal was "totally lacking in merit, framed with no relevant supporting law, conclusory in nature, and utterly unsupported by the evidence * * *, an imposition on the government which is forced to defend against the appeal and on the taxpayers who must pay for that defense" (*id.* at A6).

2. While this appeal was pending, petitioner filed a motion in the district court, alleging newly discovered evidence "which by due diligence could not have been discovered in time to move for a new trial * * *." Fed. R. Civ. P. 60(b)(2). See Pet. App. A9. This motion was supported by an affidavit of Marvin Schell, who had been petitioner's controller in 1980. He stated that within two weeks of the time that petitioner was served with the complaint in this action (*i.e.*, September 9, 1980), he had sent a complying report to the FTC by certified mail, return receipt requested (*id.* at A9-A10). Petitioner also submitted two affirmations by attorney Beane. The first stated that Beane had only recently been able to locate Schell, specifically stating (*id.* at A10):

> I can state as my own knowledge that I was informed by MR. SCHELL at the time that this proceeding was served upon the defendant that the report would be filed shortly thereafter, and that it was filed shortly thereafter, and that the copy of the report that I had supplied to the U.S. Attorney was a copy given to me by MR. SCHELL within two (2) weeks of that date.

Beane's second affirmation reiterated that Beane had been informed in September 1980 that Schell had filed a report in that month (*ibid.*).[3] In response to the Rule 60(b) motion,

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[3]This assertion was directly contrary to Beane's earlier statements to government counsel, a part of the record in the district court, that he did not know which employee made the alleged filing, or any "specifics of the filing." See Pet. App. A4.

the government informed the court that the FTC had no record of receiving the alleged September 1980 report, and petitioner at no time produced the return receipt that allegedly had been requested (*id.* at A10-A11).

The district court denied petitioner's Rule 60(b) motion by memorandum endorsement. The court of appeals affirmed (Pet. App. A7-A15). It noted that a Rule 60(b) determination will only be reversed for abuse of discretion, and that Rule 60(b) requires a showing that the evidence was newly discovered and could not have been found by due diligence (Pet. App. A11). The court concluded that, in view of Beane's admissions that he knew "all along" about Schell's evidence, "it would be the height of whimsy to characterize Schell's present statement as 'truly newly discovered' evidence" (*ibid.*). The court further noted that Beane's explanations as to why he could not reach Schell between the end of 1980 and April 1982 were quite feeble and failed to specify what means Beane had used to attempt to locate Schell, other than to call a single telephone number (*id.* at A11-A12).

The court of appeals once again assessed double costs and $500 in attorneys fees — this time against Beane personally pursuant to 28 U.S.C. (Supp. V) 1927 (Pet. App. A15). The court found that the low quality of the two appeals and "the inconstancy of the representations and arguments made by Beane in [petitioner's] behalf at the trial and appellate levels * * * ha[d] unduly delayed the termination of this litigation and ha[d] caused the proceedings to be unreasonably and vexatiously multiplied" (*id.* at A13-A15).[4]

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[4]In addition to his inconsistent statements concerning whether he knew about an alleged September 1980 filing at the time of the filing, Beane gave different answers concerning his efforts to find Schell. He stated in his written submissions to the court that he had been unable to

3.a. Petitioner contends (Pet. 12-19) that its Rule 60(b) motion should have been granted by the district court. This contention plainly presents no issue worthy of this Court's consideration.[5] Rule 60(b) requires a showing that the evidence is newly discovered and could not, by due diligence, have been discovered in time to move for a new trial. See, *e.g., Pioneer Insurance Co.* v. *Gelt*, 558 F.2d 1303, 1312 (8th Cir. 1977). Petitioner's assertions that it exercised due diligence in trying to obtain Schell's affidavit (Pet. 12-16) are simply a quarrel with facts found by two courts below and present no issue warranting review by this Court. See, *e.g., Berenyi* v. *Immigration Director*, 385 U.S. 630, 635-636 (1967). Petitioner's main argument — that the evidence was unavailable because Schell was in a mental institution — was not made until oral argument on appeal, was unsupported by documentary evidence, and was unsworn.[6] Its secondary argument that it could not afford to pay for more diligent efforts (Pet. 14) is insufficient and, moreover, absurd in light of petitioner's substantial financial resources.[7] Finally, petitioner never seriously disputes the court of

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locate Schell because he had been trying the wrong telephone number. Then, for the first time at oral argument on appeal, he told the court that he had been unable to locate Schell because Schell had been in a mental institution (Pet. App. A14).

[5]The appropriateness of the original summary judgment order, of course, is no longer an issue, because time to petition for review of the court of appeals' judgment on the first appeal has expired.

[6]*Nagell* v. *United States*, 354 F.2d 441, 448-449 (5th Cir. 1966), on which petitioner relies (Pet. 16), concerned information known only to a defendant in a criminal case, whose mental disorder "caused, if not compelled, him" to conceal the relevant information. Here, by contrast, the relevant information was also known to Beane, who makes no claim that mental disease compelled him to withhold the information.

[7]Petitioner's reported sales in the last quarter of 1979 were $32.6 million (Jt. App. A32).

appeals' determination that, regardless of diligence, the evidence was not newly discovered. Compare Pet. 12-13 with Pet. App. A11.[8]

b. Petitioner's challenge (Pet. 16-17) to the appropriateness of the sanctions assessed against attorney Beane is unsound. First, petitioner lacks standing to seek review of this part of the judgment because it is not subject to the order to pay costs and attorney's fees, which was entered against Beane. See, *e.g.*, *Warth* v. *Seldin*, 422 U.S. 490, 498-500 (1975). In any event, the history of this litigation, as set forth in the court of appeals' two opinions, demonstrates that the court did not abuse its discretion in imposing the penalties under 28 U.S.C. (Supp. V) 1927.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

MAY 1983

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[8]Petitioner now asserts (Pet. 12-13) that Beane's recollection of what Schell told him was inadmissible hearsay, and it suggests that it was for this reason not offered by Beane. This claim is inconsistent with Beane's statement to the government attorney in October 1981 that Beane was not providing further information because he had none. Further, if Schell were truly unavailable, Beane could have sought to have his account of Schell's testimony admitted under Fed. R. Evid. 804(a). In fact, Beane made no offer at all, asserting that he could not tell the government which employee made the alleged filing.

No. 82-1631

IN THE

Supreme Court of the United States

October Term, 1982

POTAMKIN CADILLAC CORPORATION,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITIONER'S REPLY MEMORANDUM

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June 3, 1983

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

No. 82-1631

POTAMKIN CADILLAC CORPORATION, Petitioner

v.

UNITED STATES OF AMERICA, Respondent

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITIONER'S REPLY MEMORANDUM

There are certain errors and misstatements in the government's memorandum in opposition which must be corrected.

It is at all times to be pointed out to the Court that there was never a trial of this matter.

This matter revolves around a motion for summary judgment, and the rules of evidence and the method of proof employed in summary judgment proceedings are not the same as at trial. All that must be shown to defeat a motion for summary judgment is that an issue exists, not the evidence which conclusively proves or supports the argument.

1. The government has at all times acted improperly with regard to the statement that Petitioner's counsel made, that he did not know about the filing of the report. The government knew full well that this statement referred to the original filing of the report, and not to the filing by Marvin Schell. In fact, the answer filed in the case, and the letter submitting the copy of the report, which the government accepts as the first filing, clearly indicate that the report had been filed at an earlier time. The business record rule, of course, applies to all of these proceedings.

2. There is no showing in the record to indicate that Petitioner's counsel called a wrong telephone number. The telephone number used to reach Marvin Schell was correct, but Marvin Schell did not answer, as he was confined to a mental institution. Counsel had no way of knowing this at the time the telephone calls were made. Counsel only learned of Marvin Schell's confinement to a mental institution one day prior to the oral argument before the Second Circuit.

3. The present case is not an instance where the government sought to collect a tax or monies generally due to it, nor is it a case involving any attempt to delay the government from collecting monies rightfully due to it. It is a case where a business organization is attempting to defend itself against an unusually heavy penalty for a slight misdeed, the alleged failure to file a report. The government has made no showing as to the necessity and value of the report at issue, or how the government was

injured if in fact the report was not promptly filed. Further, the government has made no showing as to the steps it takes to ensure that such reports are properly collected and carefully preserved.

4. Petitioner's counsel did not have the wisdom to locate Marvin Schell when there was no answer at his correct telephone number, and he was not responding to the call because he was away in a mental institution, and did not inform anyone that he was in a mental institution. The doctor-patient privilege makes it exceedingly difficult to discover someone who checks himself into a mental institution without giving any notice to other parties. Considering the number of mental institutions in the United States, it would have been impossible, as a practical matter, to have located Marvin Schell. Further, the undue haste with which the Court acted in this matter is one of the causes of the problem.

5. The Petitioner herein is a company that does business in the United States, pays very substantial taxes to the United States government, and gives employment to in excess of three hundred people, and its existence is certainly beneficial to the community. Therefore, the Petitioner should not suffer the type of sanctions which it did.

The automobile industry is in great difficulty. Even though the government in its brief shows a very high sales figure, it does not show a profit figure. If automobile dealers in America are to be harassed in this manner by the government, undoubtedly, great harm will come to the republic by way of unemployment and all its accompanying evils.

6. The Petitioner in this matter did not seek to harm any party, and no party has been harmed by Petitioner's action. The government obtained

a windfall of $40,000, and the judgment was at all times covered by a bond so that the government would collect its money, with interest. Nothing was done here to vex or delay the government. The actions of the Petitioner herein were the actions of a businessman attempting to prevent an unnecessary loss of its funds. Businessmen and business organizations have a constitutional right to protect their property and to address arguments to the Court.

7. In the interest of judicial economy, a motion was in fact made to the United States Court of Appeals for the Second Circuit to combine both appeals, so as to save the time and energy of all parties. That motion was denied on August 27, 1982.

8. The imposition of costs against counsel is totally without cause. It will serve no purpose but to cast a chill on any future

counsel's resolve to bring an appeal from any decision which counsel may believe is wrong. Reasonable parties may differ, but the differences in the instant case are not wild or insane. They are differences which are legitimately held by the parties, and which should be addressed to a tribunal without fear that counsel will be punished. In the early history of the United States, when the American Revolution was conceived, similar tactics were used against Peter Zenger, the printer of the newspaper that attacked the British government. He was disbarred and also suffered sanctions because of unpopular views. The federal courts should never lend their authority to such despotic practices. There may exist cases where there are reasons for sanctions, but this present case is certainly not among them. In fact, in the oral argument of the original motion, the judges themselves questioned how

in good faith the government could ask for costs, when it was receiving a $40,000 windfall.

What is at issue in the present case is a motion for summary judgment, and not a trial verdict. Summary judgment is a drastic remedy, and, for that reason, all that must be shown to defeat it is the existence of a controversy, and not the full dimensions or the outcome of the controversy. In view of the fact that evidence of a highly probative nature was discovered a very short time after the argument of the motion, the motion for 60(b)(2) relief should have been granted, in the interest of justice. The American business community is as much entitled to justice as any other group. The benefits that America receives from its business community are equal to, and perhaps

more tangible and direct, than those received by other groups who have obtained far greater leniency from the courts.

It is therefore respectfully submitted that the petition for a writ of certiorari should be granted.

PHILIP I. BEANE
Counsel for Petitioner

June 1983